IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0522

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROLAND DEE TIREY,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Eleventh Judicial District Court,
Flathead County, The Honorable Katherine R. Curtis, Presiding

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1. Did the district court abuse its discretion by revoking Appellant's suspended sentence without considering whether there were adequate alternatives to incarceration and without considering his homeless status was due to his probation officer's failure to conduct a required home check?

2. Did the district court exceed its statutory authority in revoking Appellant's suspended sentence when, in the absence of any allegation of a new offense, it increased the Department of Correction's (DOC) Level I designation and imposed additional conditions?

3. Did the district court err by not expressly stating reasons for denying Appellant credit for time spent on probation?

STATEMENT OF THE CASE AND FACTS

This case revolves around a probation officer's three-week failure to visit a Level I probationer's proposed residence, knowingly leaving him homeless and ineligible to stay in a Missoula shelter during frigid weather in November and December, 2008. Knowing the local shelters would not allow Tirey to stay overnight, his probation officer, Sandra Fairbank, chose to leave him homeless for three weeks in arctic weather, thereby placing insurmountable obstacles in his path to rehabilitation. Ms. Fairbank arrested Tirey on December 3, 2008, as he arrived

for his first confirmed aftercare appointment, and thereafter filed a Report of Violation.

On September 19, 1996, Tirey entered a plea of guilty to felony sexual assault committed against his stepdaughter in February, 1996. (D.C. Doc. 28.) (Ex. A.) Tirey had two sex offender evaluations performed by providers qualified by the Montana Sex Offenders Treatment Association (MSOTA): one by Michael Scolatti, Ph.D. and one by the Northwest Family Recovery Program. (Ex. A at 1-2, ¶¶ 2-3.) The district court considered both MSOTA evaluations before sentencing Tirey in open court on March 27, 1997, to fifty years in the Montana State Prison (MSP), with twenty-five years suspended, subject to conditions of probation. (Ex. A at 3-6.) Tirey was ordered to register as a sex offender. The district court did not specify a registration tier level at the time of sentencing in open court or in the subsequent written Judgment. (Ex. A at 6-7.)

Tirey was released on parole in 2004. His parole was revoked after a Missoula Probation and Parole Officer seized his computer, and he was returned to MSP. Tirey sued the DOC, the State, and several Missoula probation officers in federal court in connection with the seizing of his computer. Missoula Probation and Parole offered Tirey a settlement before the matter was eventually dismissed. (3/19/09 Tr. (Tr.) at 25.) Following the revocation of his parole in 2004, Tirey discharged his MSP sentence and was released on probation to serve his suspended

sentence. Due to the litigious history with Missoula Probation and Parole, Tirey wanted to transfer his probation to a different county. (Tr. at 41.)

On April 15, 2008, the DOC designated Tirey a Level I offender before releasing him to Missoula probation on November 11, 2008. (Ex. B; Mont. Code Ann. § 46-23-509.) Tirey's 2008 Tier I designation was recommended and approved by MSOTA provider Blair Hopkins, the MSP Sexual Offender Treatment Specialist. (Ex. B.)

Customary procedures require sex offenders leaving MSP to have prior arrangements in place for their employment, residential and aftercare needs. (Tr. at 7.) The full customary procedure was not followed in Tirey's case. Tirey was released on probation to Missoula without any supportive structure in place for a successful transition. (Tr. at 7.) Tirey met with Ms. Fairbank on November 12, 2008. Just four months later, Ms. Fairbank was no longer supervising sex offenders, allegedly due to complaints regarding her treatment of them. (Tr. at 26.)

Tirey was not provided his prescribed medications (for high blood pressure, depression, blood thinners, asthma, etc.) when he left MSP. (5/12/09 Tr. at 49.) The sudden cessation of Tirey's prescriptions made him quite ill and unable to concentrate. (Tr. at 33; 5/12/09 Tr. at 49-50.) In spite of his continuing struggle with winter homelessness, the lack of support, and lack of prescribed medications, Tirey attempted to meet the requirements imposed by Ms. Fairbank.

To address his residential needs, Tirey provided Ms. Fairbank with a map to a home that he believed was suitable for him as a Level I offender. (5/12/09 Tr. at 36-37, 39; Ex. D.) However, Tirey was unable to move into the residence until Ms. Fairbank visited it and approved it. (5/12/09 Tr. at 38-39.) Ms. Fairbank knew Tirey had been turned away from Missoula's homeless shelters and was without suitable shelter during a winter that brought colder than normal temperatures. (5/12/09 Tr. at 36; Ex. E.) Yet, Ms. Fairbank never found the time or vehicle to visit Tirey's proposed residence. (5/12/09 Tr. at 37.) Ms. Fairbank knew her failure to perform the required check on Tirey's proposed residence forced him, by default, to live in a borrowed, run-down truck in freezing temperatures. Tirey parked at various truck stops, tried to stay warm while sleeping in the truck, and contacted Ms. Fairbank daily to advise her of his sleeping location. (Tr. at 43.)

Tirey attempted to secure employment as required by Ms. Fairbank, even though he had a pending social security disability claim due to a back injury sustained at MSP. (Tr. at 40.) When Tirey was unable to find a job within two weeks, Ms. Fairbank required him to log twenty contacts with employers every day. (Tr. at 8.) Ms. Fairbank's job search log required Tirey to obtain signatures from each and every employment contact he made. "I pretty much outline that they need to be working as hard to find a job as if they were working eight hours a

day." (Tr. at 8-9.) Ms. Fairbank considered the twenty-employment-contacts per day to be "pretty easy" for Tirey to obtain. (Tr. at 18-19.)

Ms. Fairbank required Tirey to enroll in aftercare within two weeks. (Ex. F.) To address his aftercare needs, Tirey asked Ms. Fairbank for the contact information for Ms. Lindsey Clodfelter, a founding member and past president of MSOTA. (Tr. at 37; 5/12/09 Tr. at 8.) Ms. Clodfelter "ran groups" at MSP for seven years before she entered private practice in Missoula. (5/12/09 Tr. at 8.) Ms. Clodfelter worked with Tirey in MSP and in the community while he was on parole. (5/12/09 Tr. at 10.)

Ms. Fairbank provided Tirey with Ms. Clodfelter's cell phone number. Tirey was required to leave phone messages for Ms. Clodfelter and wait for her to return his call. Tirey had difficulty contacting Ms. Clodfelter, who confirmed she had problems with her cell phone during this time period. (Tr. at 37; 5/12/09 Tr. at 13, 20.) Ms. Fairbank knew Ms. Clodfelter had not returned Tirey's calls. (Tr. at 57.)

In the early afternoon of November 20, 2008, Tirey finally received a return phone call from Ms. Clodfelter, who said she had time to see Tirey at 3:00 that day. Tirey explained to Ms. Clodfelter he was in a job interview in Florence at that time and he did not know if he would be able to make it to her office in Missoula

by 3:00. (Tr. at 36, 49, 51-52.) Tirey later left a message for Ms. Clodfelter to confirm he would not be able to be in Missoula by 3:00. (Tr. at 36.)

Tirey understood from Ms. Clodfelter that her therapy sessions occurred on Thursdays. (Tr. at 50.) At one point, Tirey explained to Ms. Fairbank that Ms. Clodfelter's next session would be held on Thursday, November 27, 2008. Ms. Fairbank believed Tirey lied to her because Thursday, November 27, 2008, was the Thanksgiving holiday. (Tr. at 67.) The homeless Tirey was unaware of the date of the Thanksgiving holiday. Regardless, Ms. Fairbank jailed Tirey on November 26, 2008, on a seventy-two hour hold for his alleged dishonesty. Tirey went without his prescribed medications while he was in detention. (Tr. at 33.) Tirey was released on Saturday, November 29, 2008. (Tr. at 32.) Although he did not have a scheduled probation appointment, Tirey timely reported in person to Ms. Fairbank on Tuesday, December 2, 2008. (Tr. at 28.) Tirey also called Ms. Clodfelter on December 2, 2008, to confirm his first aftercare appointment time on December 3, 2008. (Tr. at 38, 48.)

On December 3, 2008, Tirey was en-route to his 7:30 a.m. appointment with Ms. Fairbank when his borrowed truck/residence, with its broken gas gauge, ran out of gas. (Tr. at 23.) Tirey immediately called Ms. Fairbank. (Tr. at 23.) Tirey repeatedly called her, and left several voice messages advising her of the unexpected problem. Ms. Fairbank failed to return Tirey's voice messages and

failed to instruct him on how to proceed once he was late for his appointment. Tirey continued with his required job search, and then he reported to Ms. Clodfelter for his appointment at noon. (Tr. at 30-31, 34-35.) Although Ms. Fairbank did not have time to return Tirey's phone calls and messages to instruct him how to proceed after he ran out of gas, she had time to wait for him at Ms. Clodfelter's office in order to arrest him. (Tr. at 16.) According to Ms. Fairbank, she arrested Tirey at Ms. Clodfelter's request. (Tr. at 16.) Ms. Clodfelter, however, was "quite upset" that Ms. Fairbank arrested Tirey in her office on December 3, 2008. (Tr. at 24.)

Ms. Clodfelter's records regarding Tirey's contacts and appointment times reflect the same confusion regarding appointment times that Tirey reported and experienced. For instance, Ms. Clodfelter believed Tirey missed a December 3, 2008 appointment, and was arrested on December 11, 2008. (5/12/09 Tr. at 12.) Ms. Fairbank arrested Tirey on December 3, 2008, at Ms. Clodfelter's office. Tirey was in detention on December 11, 2008.

During Tirey's revocation hearing, the district court determined Tirey had violated Special Court Condition # 1-C (failure to turn in job logs on a daily basis), Special Court Condition # 1-E (failure to report to Ms. Fairbank as directed on December 3, 2008), and that he failed to comply with all recommendations for outpatient treatment because he had not "enrolled" in treatment within two weeks

from November 12, 2008, as directed and missed appointments on November 25, 2008 and December 2, 2008. (Tr. at 73; Ex. C at 2.) The district court revoked Tirey's probation and set a date for a dispositional hearing. (Tr. at 75.)

With full knowledge of Tirey's history and shortcomings, Ms. Clodfelter testified at the dispositional hearing that she remained willing to accept him into her community-based treatment group. (5/12/09 Tr. at 10-11.) In Ms. Clodfelter's experience, Tirey "has always participated" in therapy. (5/12/09 Tr. at 11.) Tirey had contacted her and enrolled in aftercare. Ms. Clodfelter "just wanted to meet with [Tirey] and talk with him before he started group and I would be glad to have him back in group." (5/12/09 Tr. at 11.) In Ms. Clodfelter's professional opinion, such community treatment would be productive for Tirey. (5/12/09 Tr. at 21.)

Ms. Fairbank, who no longer supervises sex offenders, disregarded Ms. Clodfelter's MSOTA-qualified, professional evaluation of Tirey as well as her recommendation for community-based treatment. Ms. Fairbank admitted there are no allegations that Tirey committed new offenses while on probation. Ms. Fairbank conceded there are no reports or allegations of Tirey loitering or frequenting places where children normally frequent, no reports of Tirey using pornography, and that Tirey was in attendance at Ms. Clodfelter's office for treatment on December 3, 2008, when she arrested him. Yet, Ms. Fairbank recommended revocation of Tirey's twenty-five year suspended sentence with a

requirement that he serve the remainder of his sentence in MSP. (5/12/09 Tr. at 33.) Ms. Fairbank further recommended the district court set additional conditions on Tirey's parole and elevate Tirey's tier designation from a Level I to a Level II or III. (5/12/09 Tr. at 33-34.)

Defense counsel was "stunned" by Ms. Fairbank's recommendation. (5/12/09 Tr. at 67-68.) Defense counsel recommended continued suspension and argued:

> I think he [Tirey] has a place to live if the probation and parole go out and--and approve it for him which hasn't been done. He hasn't been out very long and I just think for what's happened here it's almost like it--he may have gotten off on the wrong foot but he also didn't have an approved place to stay, and um, he was trying here.
>
> And I think to send this man back to a sentence of 25 years to prison when we have no new offenses or even any allegations of wrongdoing, I--I--I--I'm stunned by that recommendation.

(5/12/09 Tr. at 68.)

Absent any analysis of alternatives to incarceration, the district court ordered Tirey committed to MSP for twenty-five years, with seven years suspended. (5/12/09 Tr. at 71; D.C. Doc. 124; Ex. C.) The district court's rationale for Tirey's sentence was "the nature of the violation of probation conditions, particularly his failure to participate in sex offender treatment as recommended. The Defendant fails to take responsibility for not attending treatment as directed and offers incredible excuses for when he does miss treatment appointments." (Ex. C at 2-3.)

The court erroneously interposed "attend" into Ms. Fairbank's requirement that Tirey "enroll" in treatment within two weeks. (Ex. F.)

Ms. Fairbank recommended the district court set conditions of parole. The district court and the State recognized the district court did not have authority to set conditions of parole. (5/12/09 Tr. at 33.) However, the State recommended that eighteen new conditions be imposed on Tirey's suspended sentence. (5/12/09 Tr. at 71.) The district court added new conditions to those conditions previously imposed on Tirey during sentencing for his 1996 crime. (Exs. A & C.) The State was ordered to draft the new set of conditions:

> THE COURT: . . . Mr. Corrigan, work hard if you could to try to make sure we don't have redundancy and that sort of thing--
>
> MR. CORRIGAN: I will.
>
> THE COURT: --to try to get them into one cohesive list of conditions that we all can understand and Mr. Tirey can try to abide by.

(5/12/09 Tr. at 77.)

Finally, the district court followed Ms. Fairbank's recommendation and enhanced the DOC's designation of Tirey as a Level I offender and ordered him to register as a Level II. (5/12/09 Tr. at 73-74; Ex. C at 3.) In so doing, the district court relied on the twelve-year-old evaluations performed by Dr. Scolatti and Northwest Family Recovery Program. (5/12/09 Tr. at 43-44.) The district court

made no mention of, and failed to consider MSOTA-qualified Blair Hopkins' most recent 2008 assessment of Tirey as a Level I offender.

SUMMARY OF THE ARGUMENT

The district court failed to consider Ms. Fairbank's admitted failure to conduct the required check of Tirey's proposed residence. The district court failed to consider the effect of unnecessary and unwarranted homelessness on the reasonableness of the probation officer's requirements for Tirey, or its effect on Tirey's ability to comply with the conditions he allegedly violated. The district court confused the probation officer's actual requirement that Tirey "enroll" in aftercare treatment within two weeks with a non-requirement that he "attend" within two weeks.

The district court exceeded its statutory authority by enhancing the DOC's Level I designation of Tirey's risk to reoffend. The district court further erred by imposing additional conditions on Tirey's suspended sentence. The district court erred by revoking Appellant's probation without any allegation of a new offense, and erred by failing to consider whether there were adequate alternatives to incarceration. Finally, the district court erred by failing to state reasons for denying Tirey credit for the "street time" he spent on probation.

STANDARD OF REVIEW

A district court's revocation of a suspended sentence is reviewed for abuse of discretion. *State v. Anderson*, 2002 MT 92, ¶ 10, 309 Mont. 352, 46 P.3d 625, *citing State v. Richardson*, 2000 MT 72, ¶ 8, 299 Mont. 102, 997 P.2d 786. "A district court abuses its discretion if it acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice." *State v. Price*, 2008 MT 319, ¶ 13, 346 Mont. 106, 193 P.3d 921, *citing State v. Sanchez*, 2008 MT 27, ¶ 15, 341 Mont. 240, 177 P.3d 444.

A criminal sentence is reviewed for legality and a determination whether it is within statutory parameters. *State v. Seals*, 2007 MT 71, ¶ 7, 336 Mont. 416, 156 P.3d 15, *citing State v. Tracy*, 2005 MT 128, ¶ 12, 327 Mont. 220, 113 P.3d 297. The determination of legality is a question of law that is reviewed de novo. *Seals*, ¶ 7, *citing State v. Montoya*, 1999 MT 180, ¶ 12, 295 Mont. 288, 983 P.2d 937; *State v. Johnson*, 2000 MT 290, ¶ 13, 302 Mont. 265, 14 P.3d 480. Applicable sentencing statutes are those that were in effect at the time the underlying offense was committed. *Seals*, ¶ 8, *citing Tracy*, ¶ 16.

ARGUMENT

I. THE DISTRICT COURT ERRED AND ABUSED ITS DISCRETION BY FAILING TO CONSIDER WHETHER THERE WERE ADEQUATE ALTERNATIVES TO INCARCERATION.

A district court may revoke a suspended sentence when it is "reasonably satisfied that the conduct of the probationer has not been what he agreed it would be if he were given liberty." *Anderson*, ¶ 10, *citing Richardson*, ¶ 10. Once a district court has determined a violation has occurred, the inquiry "is whether the purposes of rehabilitation are being achieved and whether those purposes are best served by continued liberty or incarceration." *Anderson*, ¶ 19, *citing Richardson*, ¶ 17. "[B]y its plain language, the revocation statute contemplates that probation violations may not warrant sentence revocation or imposition of a prison sentence." *State v. Boulton*, 2006 MT 170, ¶ 17, 332 Mont. 538, 140 P.3d 482. A judge must clearly state, for the record, the reasons for imposing sentence at the time of sentencing. *Anderson*, ¶ 18, *citing* Mont. Code Ann. § 46-18-102(3)(b).

"[V]iolations of non-financial probationary conditions need not necessarily be willful in order to justify revocation." *State v. Lee*, 2001 MT 176, ¶ 21, 306 Mont. 173, 31 P.3d 998. However, when an offender's violation is not due to willful conduct but is due to actions of the State, due process requires a court to consider adequate alternatives to incarceration that further the purpose of a suspended sentence. *Lee*, ¶ 23.

Here, the district court's stated concern on May 12, 2009 was Tirey's "failure to offer any credible--at least as far as the Court analyzes, any credible excuse" for not getting into treatment sooner than December 3, 2008, when he was arrested at Ms. Clodfelter's office. (5/12/09 Tr. at 70.) The district court's rationale for returning Tirey to MSP was the perception that he "fail[ed] to take responsibility for not attending treatment as directed and offers incredible excuses for when he does miss treatment appointments." (Ex. C at 2-3.) Like *Anderson*, the court did not engage in any analysis or reasoning regarding an appropriate sentence in light of Tirey's rehabilitation prospects. *Anderson*, ¶ 19. Had the court done so, it would have been apparent that Tirey had complied with the specific requirement that he "enroll" in aftercare treatment within two weeks. (Ex. F.) The district court confused the actual condition that Tirey "enroll" in treatment within two weeks with a non-requirement that Tirey "attend" treatment within two weeks.

The court failed to consider whether there was an adequate alternative to Tirey's incarceration. First, the court failed to consider that Tirey was homeless due to the inaction of the State, and that his involuntary homelessness was an impediment to immediate compliance with all the requirements imposed by Ms. Fairbank. Second, the court failed to consider Tirey had enrolled in Ms. Clodfleter's treatment program and failed to consider her MSOTA-qualified opinion that Mr. Tirey would benefit from community treatment. Finally, the court

failed to address Ms. Clodfelter's testimony that she welcomed him into her treatment group, where he had always participated.

A. The State's Inaction Ensured Tirey Remained Homeless in Arctic Temperatures and Created an Unnecessary and Inhumane Impediment to His Rehabilitation.

A probation officer has a statutory duty to encourage a probationer to improve his or her condition. Mont. Code Ann. § 46-23-1011(3). Ms. Fairbank not only failed to encourage Tirey to improve his condition, she sat idly by, caused him to remain homeless, and placed insurmountable obstacles in his path while he was under her supervision. It is undisputed Tirey could not move into his proposed residence until Ms. Fairbank visited it and approved it for him. (5/12/09 Tr. at 38-39.) Ms. Fairbank knew the local homeless shelter turned Tirey away. (5/12/09 Tr. at 36.) Ms. Fairbank knew Tirey was living in a borrowed truck. (Tr. at 43.) Yet Ms. Fairbank failed to find the time or the vehicle to make the required visit to Tirey's proposed residence so he could benefit from one of life's basic necessities --that of warm shelter. (5/12/09 Tr. at 37.)

The State has responsibility for a residential inmate's general well being and basic human needs, including food, clothing, shelter, medical care, and reasonable safety. *Walker v. State*, 2003 MT 134, ¶ 80, 316 Mont. 103, 68 P.3d 872, *citing Helling v. McKinney*, 509 U.S. 25, 32 (1993). Upon his release from MSP, Tirey was no longer an MSP inmate; the State no longer had responsibility for him as a

residential inmate. However, under the facts presented here, the State, through Ms. Fairbank, retained full control over Tirey's basic human need for shelter. Tirey located what he believed was suitable shelter and provided a map to Ms. Fairbank. Tirey needed Ms. Fairbank's approval before he could avail himself of that basic shelter. Ms. Fairbank never used the map, never visited the residence, never showed any concern, and never took a single step to encourage Tirey to end his homelessness.

Ms. Fairbank was indifferent to Tirey's lack of basic winter shelter and thereby knowingly placed insurmountable obstacles to his success. Ms. Fairbank testified her requirements for the homeless Tirey were easy to accomplish in an eight-hour work day. Both Ms. Fairbank and the district court failed to consider that while the twenty-employment-contacts per day may be reasonable for a probationer with the stability of suitable winter shelter and easy access to the necessities of life present in a residence, it was arbitrary, unreasonable, and oppressive for the still homeless Tirey.

Notably, an eight-hour day allowed just twenty-four minutes for the homeless Tirey to find, schedule, drive to, apply, interview, and obtain signatures for each of Ms. Fairbank's required twenty employment contacts per day (eight hours x sixty minutes / twenty contacts = twenty-four minutes per contact). It failed to account for the time Tirey needed to spend warming up each morning

after spending the night in the elements, finding food, providing for his basic grooming needs, arranging for a parking place for his truck/home each day, traveling to and meeting with Ms. Fairbank, or making arrangements for aftercare appointments. These additional obstacles were time-consuming and unnecessary but for Ms. Fairbank's failure to visit Tirey's proposed residence.

The logical corollary to Ms. Fairbank's "easy to accomplish" point of view is that it should have been just as easy, if not more so, for her, as a State employee, to fulfill her duty to conduct a residential check for a homeless probationer living in a truck during frigid weather. Instead, Ms. Fairbank chose to hold Tirey prisoner to unnecessary homelessness through her indifference to his need for shelter. Tirey did his part; he located a residence and provided a map. Ms. Fairbank did not do her part.

"Reasonable and ordinary care must be exercised for the life and health of the prisoner." *Pretty on Top v. City of Hardin*, 182 Mont. 311, 315, 597 P.2d 58, 60-61 (1979) (citation omitted). Ms. Fairbank offered no excuse, other than she did not have a four-wheel drive vehicle. (5/12/09 Tr. at 37.) Ms. Fairbank's proffered excuse is insufficient, but it serves to highlight the extreme, snowy conditions she knowingly forced Tirey to endure while living in a truck.

This Court has eloquently referenced an article observing that: "However we punish, whatever means we use to reform, we must not punish or reform in a

way that degrades the humanity, the dignity of the prisoner." *Walker*, ¶ 81 (citation omitted). Tirey was no longer a prisoner of the State housed at MSP. On November 12, 2008, Tirey became a prisoner of Ms. Fairbank's duty to approve his proposed shelter. Tirey was forced to rely on Ms. Fairbank for his housing. *Walker,* ¶ 82. Without Ms. Fairbank's approval, Tirey remained homeless and living in a borrowed truck.

The court failed to consider the substantial injustice that Tirey remained homeless through no fault of his own, but due to the inaction of Ms. Fairbank on behalf of the State. Tirey could not cure his homelessness without Ms. Fairbank's approval of his proposed residence. Ms. Fairbank's failure to conduct a home check placed an insurmountable obstacle in Tirey's successful transition to supervised liberty. Tirey was homeless the entire time he was under Ms. Fairbank's supervision with the exception of the seventy-two hours he spent in detention due to Ms. Fairbank's determination he had lied to her about the next aftercare group session meeting on November 27, 2008. Ms. Fairbank failed in her statutory duty to encourage Tirey, failed in her duty to visit his proposed home, and was indifferent to the unnecessary suffering he endured due to the extreme elements.

The court failed to consider the State was responsible for Tirey's homelessness, failed to consider the effect of this insurmountable obstacle and

substantial injustice, and failed to consider that Tirey's proposed residence provided an adequate alternative to incarceration.

B. Tirey "Enrolled" in Aftercare Within Two Weeks and He Will Benefit from Community Treatment.

Ms. Fairbank required Tirey to "enroll" in aftercare treatment within two weeks. (Ex. F.) Tirey did so. In spite of the undisputed difficulty contacting Ms. Clodfelter, Tirey had enrolled in her aftercare treatment program no later than November 20, 2008, well within two weeks of meeting with Ms. Fairbank on November 12, 2008. Tirey enrolled with Ms. Clodfelter when she returned his phone calls on November 20, 2008. Unlike previous miscommunications between Tirey and Ms. Clodfelter, Tirey had a confirmed interview/treatment appointment with Ms. Clodfelter on December 3, 2008. Tirey was in attendance at Ms. Clodfelter's at the appointed time. Ms. Fairbank was waiting there in order to arrest him, and prevented him from attending his scheduled appointment.

The district court abused its discretion by revoking Tirey's suspended sentence for a non-requirement that he "attend" within two weeks. The verbs "enroll" and "attend" are not synonymous and are not interchangeable. Enroll is defined as "to enter the name on a roll, register, or record." *Webster's II Dictionary* 239 (3rd ed. 2005). "Attend" is defined as "to be present (at)." *Webster's II Dictionary* 48. Tirey fulfilled the condition of placing his name on the aftercare roll, register, or record of Ms. Clodfelter's aftercare program within

two weeks. The district court erroneously revoked Tirey's suspended sentence for not being present at aftercare group within two weeks.

Had a two-week "attendance" requirement actually been imposed on Tirey, it would have been impossible for him to fulfill due to conditions that were outside his control: (1) the problems Ms. Clodfelter was experiencing with her cell phone, and (2) the Thanksgiving holiday.

Tirey first met with Ms. Fairbank on Wednesday, November 12, 2008. He attempted to contact Ms. Clodfelter through the cell phone number (not office number) provided to him by Ms. Fairbank. It is undisputed Ms. Clodfelter was experiencing problems with her cell phone during this period. It is further undisputed Ms. Fairbank knew Ms. Clodfelter had not returned Tirey's phone calls. (Tr. at 57.) By Tirey's repeated phone calls to Ms. Clodfelter, he clearly attempted to enroll in aftercare treatment as required.

Tirey did not receive a return phone call from Ms. Clodfelter until Thursday, November 20, 2008, when he was miles away in a required job interview in Florence. Although Tirey was not able to attend on November 20, 2008, he had *enrolled* with Ms. Clodfelter on that date, just eight days after his November 12, 2008 meeting with Ms. Fairbank. Ms. Clodfelter's return phone call to Tirey on November 20, 2008, is the latest date that can be used to establish his enrollment in her program because that is the date Ms. Clodfelter actually returned Tirey's phone

messages. The record clearly establishes that Tirey "enrolled" in aftercare treatment with Ms. Clodfelter no later than November 20, 2008, just eight days after he met with Ms. Fairbank, and well before the fourteen-day enrollment time limit imposed by Ms. Fairbank. (Ex. F.)

Ms. Clodfelter's next available aftercare group session would have been on Thursday, November 27, 2008, a fact Tirey relayed to Ms. Fairbank, who jailed him for lying since he was unaware that date was the Thanksgiving holiday. Upon his release, Tirey attended Ms. Clodfelter's office on Wednesday, December 3, 2008, for his pre-group interview in anticipation of attending aftercare group. Tirey was not allowed to attend either the interview or the aftercare because Ms. Fairbank was waiting at Ms. Clodfelter's to arrest him.

The district court erred in revoking Tirey's suspended sentence based on his alleged failure to "enroll" in aftercare within two weeks and to "attend" aftercare treatment. Ms. Fairbank required him to enroll (place name on register), not attend (be present), within two weeks. Tirey complied with the requirement that he enroll within two weeks and he was in attendance at Ms. Clodfelter's office on December 3, 2008, when he was arrested.

Significantly, Ms. Clodfelter provided the only testimony before the district court regarding Tirey's amenability to community treatment. She testified Tirey would benefit from community treatment and she continued to welcome him into

her group, even after Ms. Fairbank arrested him at her office. (5/12/09 Tr. at 10-11, 21.) No other expert testimony was received. The district court failed to analyze Ms. Clodfelter's recommendation and therefore failed to consider whether there was an adequate alternative to incarcerating Tirey.

C. There Was an Adequate Alternative to Tirey's Incarceration: Require the State to Conduct a Home Check and Allow Tirey to Attend Treatment as Recommended by His MSOTA-Qualified Provider.

There was an adequate alternative to Tirey's incarceration. The State should be required to conduct a home check of Tirey's proposed residence in a timely manner. Tirey enrolled in aftercare within the time frame required, and he appeared on time for his first confirmed aftercare appointment. Tirey should be allowed to continue to attend aftercare treatment as recommended by MSOTA-qualified Ms. Clodfelter while he is supervised within the community. The district court failed to consider this adequate alternative to homelessness and incarceration, and failed to require the State to fulfill its duty to visit Tirey's proposed residence, failed to consider or remedy the substantial injustice imposed on Tirey by Ms. Fairbank's failure to act to end his winter homelessness.

II. THE DISTRICT COURT ERRED AND EXCEEDED ITS STATUTORY AUTHORITY UPON REVOCATION BY ENHANCING TIREY'S TIER LEVEL AND IMPOSING ADDITIONAL CONDITIONS.

"[I]t is well established that a district court's authority to impose a criminal sentence is defined and constrained by statute, and a district court has no power to impose a sentence in the absence of specific statutory authority." *State v. White*, 2008 MT 464, ¶ 22, 348 Mont. 196, 199 P.3d 274, *citing State v. Ruiz*, 2005 MT 117, ¶ 12, 327 Mont. 109, 112 P.3d 1001; *State v. Hatfield*, 256 Mont. 340, 346, 846 P.2d 1025, 1029 (1993). An illegal sentence is one that is not based on specific statutory authority. *White*, ¶ 22, *citing Ruiz*, ¶ 12. "The law in effect at the time an offense is committed controls as to the possible sentence for the offense, as well as a revocation of that sentence." *State v. Rudolph*, 2005 MT 41, ¶ 16, 326 Mont. 132, 107 P.3d 496, *citing State v. Brister*, 2002 MT 13, ¶ 26, 308 Mont. 154, 41 P.3d 314. The imposition of a sentence under statutes not in effect at the time the offense was committed is an unconstitutional *ex post facto* application of the law. *Tracy*, ¶ 16, *citing State v. Azure*, 179 Mont. 281, 282, 587 P.2d 1297, 1298 (1978).

Tirey's offense was committed in early 1996 and he was originally sentenced under the statutes in effect at that time. The 1995 version of Mont. Code Ann. § 46-18-203(7)(c) applies to the district court's revocation of Tirey's

suspended sentence in 2009. *Tracy*, ¶ 17; *Rudolph*, ¶ 16; *Brister*, ¶ 26. The 1995 version of Mont. Code Ann. § 46-18-203(7)(c) provides:

> If the court finds that the defendant has violated the terms and conditions of the suspended or deferred sentence, the court may:
>
> * * *
>
> (c) revoke the suspension of sentence and require the defendant to serve either the sentence imposed or any lesser sentence.

Mont. Code Ann. § 46-18-203(7)(c) (1995).[1]

"Given its context, the term 'lesser sentence' must be understood as signifying a sentence which is 'lesser' than 'the sentence imposed.'" *White*, ¶ 23. The district court did not follow the mandate of § 46-18-203(7)(c) (1995) and did not impose the original sentence or a lesser sentence upon revocation of Tirey's suspended sentence. The district court exceeded its statutory authority by (1) requiring Tirey to register as a Level II offender, rather than the Level I designation determined by DOC, and (2) imposing additional conditions on Tirey's suspended sentence.

[1] Mont. Code Ann. § 46-18-203 has been amended since 1995. Upon finding an offender has violated the terms or conditions of a suspended sentence, a judge may now "revoke the suspension of sentence and require the offender to serve either the sentence imposed or any sentence that could have been imposed that does not include a longer imprisonment or commitment term than the original sentence." Mont. Code Ann. § 46-18-203(7)(a)(iii) (Amendment effective April 17, 2003).

A. The District Court Erred and Exceeded its Statutory Authority by Enhancing the DOC's Level I Designation of Tirey.

When it sentenced Tirey in 1997, the district court ordered him to register as a sex offender, but did not specify a tier level. (Ex. A.) The DOC, not the district court, now has the statutory authority to designate Tirey's tier level.

> If, at the time of sentencing, the sentencing judge did not apply a level designation to a sexual offender who is required to register under this part and who was sentenced prior to October 1, 1997, the department shall designate the offender as level 1, 2, or 3 when the offender is released from confinement.

Mont. Code Ann. § 46-23-509(5).

The sentencing judge did not apply a level designation at the time of sentencing. Tirey is required to register and he was sentenced in open court on March 27, 1997, prior to October 1, 1997. (Written Judgment was entered on April 3, 1997 (Ex. A).) The "department" refers to the DOC. Mont. Code Ann. § 46-23-502(1). Under these facts, the DOC, not the court, is authorized by statute to designate Tirey's tier level for registration purposes. Mont. Code Ann. § 46-23-509(5). The district court exceeded its statutory authority by specifying an elevated registration tier level for Tirey other than that set by the DOC.

Furthermore, the district court exceeded its statutory authority under Mont. Code Ann. § 46-18-203(7)(c) (1995). The district court did not require Tirey to serve either the sentence imposed in the written Judgment entered on April 3, 1997

(Ex. A.) or a lesser sentence. Mont. Code Ann. § 46-18-203(7)(c) (1995). The 1997 Judgment ordered Tirey to register as a sex offender without specifying a level. (Ex. A.) Under Mont. Code Ann. § 46-23-509(5), Tirey's registration level is determined by the DOC. When it increased the DOC's Level I designation (low risk) of Tirey to a Level II (moderate risk), the district court increased his sentence.

An individual has a liberty interest in being designated as a particular risk level. *State v. Samples*, 2008 MT 416, ¶ 34, 347 Mont. 292, 198 P.3d 803. "The risk of an erroneous assessment and the associated opprobrium arising from such an assessment implicate a liberty interest protected by Article II, Section 17, of the Montana Constitution." *Samples*, ¶ 34, *citing Brummer v. Iowa Dept. of Corrects.*, 661 N.W.2d 167, 174 (Iowa 2003) (tier level designation "threatens the impairment and foreclosure of the associational or employment opportunities of persons who may not truly pose the risk to the public that an errant risk assessment would indicate"). The district court erred when it ordered Tirey to register as a Level II offender.

Finally, when it enhanced Tirey's tier level designation, the district court relied on the sex offender evaluations that it reviewed in 1997 before sentencing Tirey. The court failed to consider the most recent, 2008 Level I assessment of Tirey recommended by MSOTA-qualified provider Blair Hopkins at MSP. No new evaluation was provided to the court, or requested by it. Absent any

allegation, much less conviction of a new offense, the court's reliance on stale, twelve-year-old evaluations, that were insufficient to prompt a tier level designation in the original Judgment in 1997, are insufficient to justify an enhanced tier level designation in 2009.

B. The District Court Erred and Exceeded its Statutory Authority by Imposing Additional Conditions on Tirey's Suspended Sentence.

In addition to recommending an enhancement of Tirey's tier level designation, the State further recommended the district court impose eighteen new conditions on Tirey's suspended sentence. (5/12/09 Tr. at 71, 77.) The district court ordered the State to incorporate the new conditions into those specified in the 1997 Judgment with instructions to "avoid redundancy" and " to try to get them into one cohesive list of conditions that we can all understand and Mr. Tirey can try to abide by." (5/12/09 Tr. at 77.) The district court exceeded its statutory authority in imposing new conditions and rewriting the original conditions imposed.

"The district court's authority in resentencing after revocation is limited by the parameters set forth by the original sentence, and can impose no additional restrictions." *State v. Frazier*, 2001 MT 210, ¶ 15, 306 Mont. 358, 34 P.3d 96, *citing State v. Gordon*, 1999 MT 169, ¶ 45, 295 Mont. 183, 983 P.2d 377. The district court did not limit itself to the parameters set forth in Tirey's original

sentence imposed in 1997. (Ex. A.) It imposed new conditions and allowed the State to incorporate them by rewriting the original conditions imposed. (5/12/09 Tr. at 77.) The district court erred and exceeded its statutory authority by imposing new conditions in 2009 and altering the conditions imposed in 1997.

Pursuant to *Frazier*, all of the conditions set forth in the written Judgment dated July 23, 2009 (Ex. C) must be stricken and replaced with the original conditions imposed in the written Judgment dated April 3, 1997 (Ex. A).

III. THE DISTRICT COURT ERRED BY NOT STATING REASONS FOR DENYING TIREY CREDIT FOR THE TIME HE SPENT ON PROBATION.

The district court stated Tirey "is not to receive credit for any time served on probation." (Ex. C at 6.) The court provided no reasons for its decision to deny Tirey credit for any time he spent on probation.

Montana Code Annotated § 46-18-201(4) (1995) provides in pertinent part that "the court shall consider any elapsed time and either expressly allow part or all of it as a credit against the sentence or reject all or part as a credit. The court shall state its reasons in the order." Under the applicable statute, the district court was required to state the reasons for not allowing any credit for the time Tirey spent on probation. *State v. Williams*, 2003 MT 136, ¶ 14, 316 Mont. 140, 69 P.3d 222. The district court failed to do so. Accordingly, this matter must be remanded for resentencing. *Williams*, ¶ 15.

CONCLUSION

The district court erred and abused its discretion in revoking a homeless probationer's suspended sentence. Tirey was not homeless due to his willful conduct, but to the willful inaction of his probation officer. The district court confused the actual requirement that Tirey "enroll" in aftercare treatment with a non-requirement that he "attend" within two weeks. The district court failed to consider whether there were adequate alternatives to Tirey's incarceration, such as ending his homelessness by requiring the State to conduct the required residence check and allowing him to attend group aftercare as recommended by Ms. Clodfelter, his MSOTA-qualified provider.

The district court further erred and exceeded its statutory authority by increasing the DOC's Level I designation of Tirey and by imposing and incorporating new conditions on his original sentence. The district court failed to state its reasons for not allowing credit for time Tirey spent on probation.

The district court must be reversed and the State must fulfill its duty to provide Tirey with a reasonable opportunity to end the homelessness status imposed by Ms. Fairbank, who no longer supervises sex offenders. Alternatively, this matter must be remanded for a new hearing and resentencing.

Respectfully submitted this ____ day of April, 2010.

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Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

_____

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APPENDIX